Nos. 57, 59 and 60

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois

PETITION BY FREIGHT FORWARDER APPELLEES FOR REHEARING

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OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 60

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois

PETITION BY FREIGHT FORWARDER APPELLEES FOR REHEARING

The freight forwarder appellees hereby petition the Court for rehearing of its opinion and judgment on the following dispositive question as stated and resolved in these appeals:

> "Does the Interstate Commerce Commission have authority to promulgate rules providing . . . (2) that motor and water carriers may, subject to certain conditions, utilize TOFC facilities in the performance of their authorized service?" (Op. sh. 1)

If rehearing is not granted, we respectfully ask that the opinion be modified with regard to certain important state-

ments describing the position taken by these appellees and the three-judge District Court.

REASONS FOR GRANTING REHEARING

We ask this Court for an opportunity to remove a most unfortunate misunderstanding concerning the position of these appellees on certain critical issues. The problem appears in the portion of the Court's opinion (shs. 14-22) in which it is determined that the Interstate Commerce Commission's Rule 3 is valid, *i.e.*, that motor and water carriers may ship by rail on TOFC open tariffs in lieu of the performance of all or any portion of their authorized motor or water carrier service.

Aside from what seems to be a typographical error, it is clear that the Court understood that these appellees were conceding that a motor carrier's use of open TOFC tariffs is valid *"if the railroad is willing"* (Op. sh. 16).* The Court stated, for example:

> "The argument of *appellants* and the reasoning of the District Court carefully *concede that the motor carriers may, without violating the Act or their charters, utilize this substituted service."* (Op. sh. 16)

It seems probable that the Court intended to refer to the "appellees" rather than "appellants" here. The present wording, which we think was inadvertent, would suggest that the "appellants" conceded something that they were not in a position to "concede."**

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* Italics herein are ours except where otherwise indicated.

** Similarly see sheet 16: ". . . according to the *appellants* and the District Court it is not inconsistent with the use of open-tariff TOFC if the railroad is willing." See also sheet 17: *"Appellants* and the District Court argue, however, that the following factors demonstrate that the Commission may not authorize motor carriers to use TOFC service on open tariffs . . ."

As shown below, the freight forwarder appellees certainly did not "concede" that motor carriers may utilize open-tariff TOFC service "if the railroad is willing." This matter goes to the heart of issues that these appellees endeavored to contest.

The misunderstanding is plainly critical to a review of our position, to the opinion of May 29, 1967, and to the resolution of question (2). Thus, for example, the Court said:

> "It is strenuously contended, however, that whatever may be the railroads' duty, common carriers by motor vehicle may not be authorized to substitute transportation by rail for the transportation by road which is the basis of their franchise—*except with the agreement of the railroad. It is this exception that saps the argument of some of its force, if not its fervor.*" (Op. sh. 15)
>
> • • •
>
> "This does not exclude joint arrangements with water carriers or rail carriers, which are expressly permitted by § 216(c) on a voluntary basis, and *according to the appellants and the District Court it is not inconsistent with the use of open-tariff TOFC if the railroad is willing.*" (Op. sh. 16)
>
> • • •
>
> *"It is clear that where the railroad agrees, the trucker may use this ['open-tariff TOFC'] service,* and that a motor vehicle common carrier may assemble, consolidate, *transport by piggyback in these circumstances,* and distribute after arrival at the railroad terminus. The fact that the Commission *enlarges this additional possibility* of transportation of the truckers' trailers may be a competitive fact of some significance, but it does not convert the truckers into freight forwarders, nor deprive the latter of the exclusive rights specified in the Act." (Op. sh. 22)

These and related statements make it clear that the misunderstanding has very materially affected the disposition

of question (2). We appreciate that such concessions, if they had been made, would change one's general approach to that question. The misunderstanding prejudices the legal and policy considerations by, for example, making it appear as if a motor carrier already had the right to ship by rail on open TOFC tariffs, thereby doing everything a freight forwarder does, provided a railroad was willing.

In the following portion of this petition we will attempt to make our position clear and to provide a basis for rehearing free from the misunderstanding. In addition, we submit that the District Court did not decide the case on the supposition indicated in the above-quoted statements.

If rehearing is denied, we ask the Court to modify the above-quoted statements (shs. 15, 16, 22) so that there will be no statement or inference that the freight forwarder appellees made such concessions.

I. THE FREIGHT FORWARDER APPELLEES HAVE CONTESTED RATHER THAN CONCEDED THAT RAILROAD CONSENT OR AGREEMENT WOULD SUFFICE TO LEGITIMATE A MOTOR CARRIER'S USE OF OPEN-TARIFF TOFC SERVICE.

These freight forwarder appellees have consistently contended that a railroad's consent or collaboration cannot suffice to empower a motor carrier to ship by rail or use rail TOFC service. For example, we stated, without exception or qualification, that "Part II [of the Act] does not allow a motor carrier to perform his regulated service by rail shipping" and that "Neither . . . [Section 216(c)] nor any other section permits a motor carrier to ship traffic under a rail tariff for any type of rail service" (Br. pp. 10-11). Despite their vigorous arguments, appellants at no point suggested that these appellees conceded or implied that motor carriers may ship on open TOFC tariffs if the railroad is willing.

Our contention was and is that the authorized activities of a motor carrier could not be unlawfully expanded, regardless of railroad cooperation in that effort, and that for a railroad to consent to motor carrier use of open-tariff TOFC service would be unlawful. In our brief it was submitted that a railroad would be "knowingly participating in a motor or water carrier's violation of the Act by providing rail service for TOFC or other freight traffic tendered by motor and water carriers acting as shippers under a rail tariff" (Br. p. 7). It was shown that the Interstate Commerce Commission had previously and correctly recognized this as one of the established, "fundamental legal principles pertaining" to "an open tariff published by the railroad" (*Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 104, 111 (1954); Br. pp. 47-49):

> "In a declaratory order proceeding in 1954, reaffirming the interpretation, the Commission held that it is unlawful for a motor carrier to utilize rail TOFC service by acting as a shipper under the railroad's tariffs, and the Commission warned *the railroads* that they *should not 'knowingly join' with a motor carrier 'in a violation of the law.' Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 104-105." (Br. pp. 5, 47-49)

These appellees also submitted that motor carrier use of open-tariff TOFC service would violate the mandate of Section 410(c) in Part IV of the Act which carries out the Congressional "policy of not permitting" motor, water or rail common carriers "to engage directly in" or obtain a license for "the freight-forwarding business" (Br. pp. 8-9, 13-20; 49 U.S.C. 1010(c); H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15). No party suggested that this statutory mandate and policy were subject to an exception if a railroad consented to a motor carrier's use of open-tariff TOFC service. Indeed, it is antithetical to

the position of the freight forwarders to suggest that the railroads and motor carriers that compete with freight forwarders may by mutual consent enlarge their authority and engage in the freight-forwarding business.

The ruling of the Court proceeds from the erroneous concession-premise that "where the railroad agrees the trucker may use this ['open-tariff TOFC'] service" to the conclusion that, since such activity would obviously be identical with freight forwarding, Rule 3 merely *"enlarges this additional possibility* of transportation of the truckers' trailers . . ." (Op. sh. 22). Thus the misunderstanding makes it seem that railroad consent to such use of open tariffs already involves an opportunity for motor carriers to act as freight forwarders and that there would be little additional harm in enlarging the opportunity. These appellees contended, however, that all such freight-forwarding activity by motor carriers was unlawful, regardless of railroad cooperation, and that a consenting railroad would be joining in a violation of the law. The misunderstanding minimizes the injury inflicted as a result of the Commission's Rule 3 and prejudices review of the freight forwarders' position by assuming that they effectively conceded that a motor carrier may already ship by rail on open tariffs, thus engaging in freight forwarding, if the railroad is willing.

The relevant position of the freight-forwarding industry is further demonstrated, as the Court noted, by the suit pending in a three-judge District Court and involving "the validity of Plan I service" (Op. sh. 15, n. 7).* There, al-

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* In the brief of these appellees it was stated: "In a suit pending in the United States District Court for the Northern District of Texas (*Lone Star Package Car Co.* v. *United States,* Civil Action

though Plan I clearly involves railroad consent to motor carrier use of a type of rail TOFC service, certain freight forwarders and the Freight Forwarders Institute are among the plaintiffs seeking judicial review of the Commission's approval of Plan I on the ground, *inter alia*, that Plan I does not involve through routes and joint rates within the meaning of Section 216(c) (49 U.S.C. 316(c)). Among the plaintiffs in that case is Southern Railway Company which is also an appellee here* and which in both instances fully agrees that railroad consent does not itself suffice to legitimate motor carrier use of rail TOFC service.

The freight forwarders have recognized that common motor carriers, water carriers and railroads have authority to enter into voluntary through routes and joint rates as provided by Section 216(c) (49 U.S.C. 316(c)). Plan V piggyback is, for that reason, lawful (Br. p. 59). Motor carrier participation in that plan also has different economic effects from such participation in the substituted service plans.

No. 4-355) certain freight forwarders and railroads seek to set aside the Commission's ruling in the same Commission proceeding that Plan I TOFC service is authorized as a through route arrangement under Section 216(c) of the Act. That issue is not involved in these appeals." (Br. p. 2, footnote)

* Thus, in another portion of the same Interstate Commerce Commission opinion under review here, it was noted that "the regulated freight forwarding companies and Southern Railway System" contended "throughout this proceeding that plan I TOFC is unlawful under the Act" (322 I.C.C. at 343). And in the brief of the Southern Railway System in this Court, it was stated: "In Texas, these appellees . . . have joined the freight forwarders in attacking the validity of Plan I on the ground that it does not involve [as the Commission held] a genuine through route-joint rate arrangement" (Br. 64).

The Interstate Commerce Commission ruled, however, that Plan I arrangements, like Plan V arrangements, constitute through routes and joint rates within Section 216(c) and that ruling is, as noted, one of the issues pending in other litigation that has not yet reached this Court. Unlike the open-tariff plans involved here, Plans I and V were treated separately by the Commission as "joint intermodal service" (322 I.C.C. at 337-352) involving different legal and economic considerations. The Commission recognized that Plan I, "if it is to be sustained at all, must be sustained as a joint-rate arrangement under section 216(c), the only statutory provision authorizing the maintenance of through routes and joint rates between a railroad and a motor carrier" (322 I.C.C. at 343). The Commission found that Plan I involved such an arrangement (322 I.C.C. at 349) and that the open-tariff plans did not (322 I.C.C. at 355) and dealt with the latter plans in the separate fashion being reviewed in these appeals. Indeed, as the Court correctly noted: *"In important respects, motor carrier use of open-tariff TOFC differs from a motor-rail through route-joint rate TOFC arrangement"* (Op. sh. 16, n. 8).

These matters deserve mention because it may now be mistakenly argued that these particular freight forwarder appellees have conceded that railroad consent validates motor carrier use of open-tariff TOFC service and that they have also conceded the validity of Plan I. Neither conclusion would be correct. As intervening plaintiffs in this case, we only noted and did not discuss Plan I because it was not involved in the complaint and because the Commission's decision with regard to it rested on an explicitly different theory and statutory basis.

These appellees certainly never intended to leave open to doubt that they challenged the newly created authority for motor carriers to ship their customers' goods by rail on open tariffs. In contending that "the Commission has no

authority to permit motor or water carriers to engage in freight forwarding with respect to any of their traffic" (Br. p. 10), we never intended to infer or intimate that the question of motor carrier authority for substituted service by rail depended upon railroad collaboration or consent. We contended that the Commission had been correct when it earlier, and repeatedly, ruled that for a railroad to cooperate in such activity would be knowingly to join in a violation of the law.

We recognized on brief that voluntary rail-motor through routes and joint rates are permitted by Section 216(c). Although a "concurrence" (as distinguished from consent) is one of the necessary elements to comply with Section 216(c) and related tariff provisions,* a concurrence is only one essential element in establishing a through route and joint rate under Section 216(c). And, as we have noted, "Appellants do not and cannot suggest that Rules 2 and 3 have a basis in or are made lawful by Section 216(c)" (Br. p. 42).

For the forwarders actually to have made the concessions indicated in the Court's opinion would have been to concede away a primary issue and consideration in this case. The misunderstanding has, as shown in the opinion at several places, inadvertently prejudiced the legal and policy considerations.

II. THE DISTRICT COURT DID NOT CONCEDE OR CONCLUDE THAT RAILROAD CONSENT OR AGREEMENT WOULD SUFFICE TO LEGITIMATE A MOTOR CARRIER'S USE OF OPEN-TARIFF TOFC SERVICE.

The opinion of the Court indicates that the three-judge District Court, as well as these appellees, was believed to

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* *E.g.*, see our brief, pp. 43-44.

have conceded that motor carrier use of open-tariff TOFC service was permissible if or where consented to by a railroad. This problem may have resulted from the unfortunate assumption with regard to appellees' position. The Court's opinion refers to the following sentence from the District Court opinion:

> "The policy explicit in Sections 216(c) and 402(a)(5), and implicit in the structure of the Interstate Commerce Act as a whole, does not allow a motor carrier to perform its authorized service simply by tendering the shipment to the railroad for transportation *without the railroad's concurrence.*" (R. 36; emphasis added in Op. sh. 16)

This does not imply that railroad consent or even "concurrence" validates motor carrier use of the open-tariff TOFC plans. Nor does it imply that a railroad concurrence in a Plan I arrangement would necessarily validate it as a through route and joint rate under Section 216(c). The point being made by the District Court was that *in the absence* of the type of concurrence required by Section 216(c) and the tariff provisions, the motor carrier obviously lacked at least one of the several elements necessary for valid motor-rail coordinations as provided for in Part II of the Act and had no authority to ship its customers' goods by rail.

The District Court held that "motor carriers shall perform their authorized services by motor vehicle unless shipment by other modes is permitted by some specific statutory exception" (R. 31). The District Court certainly did not conclude that some statutory exception permitted a motor carrier to ship by rail on open TOFC tariffs if or because a railroad was willing. Such activity, it held, would have exceeded "the fundamental limit on motor carrier authority" and would have been freight forwarding without statutory authority or license (R. 34, 35-36). And

the District Court, while referring to Section 216(c), did not rule upon the validity of Plan I arrangements, a matter which it noted was being adjudicated in a separate pending case (R. 34, n. 20).

CONCLUSION

For the reasons stated, this petition for rehearing of question (2) (Op. sh. 1) and the decision upholding Rule 3 (Op. shs. 14-22) should be granted. In the event rehearing is denied, we ask that the opinion be modified so that it stands without reference to concessions noted herein (involving Op. shs. 15, 16 and 22) insofar as those are attributed to positions taken by these appellees or the District Court.

Respectfully submitted,

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June, 1967

CERTIFICATE OF COUNSEL

I hereby certify, pursuant to Rule 58(2) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to substantial grounds not previously presented, such grounds being concerned with the Court's statement of premises for the decision.

/s/ .....

D. Robert Thomas

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